

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STEEL WORKERS LOCAL
12-369, STEPAHNIE B. GREEN,
and DAVID ROBERTS,

Plaintiffs,

v.

UNITED STEEL, PAPER AND
FORESTRY, RUBBER
MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND
SERVUCE WORKERS
INTERNATIONAL UNION, *et al.*,

Defendants.

NO. CV-07-5053-RHW

REPORT AND RECOMMENDATION FOR
ORDER GRANTING MOTION TO COMPEL
PRODUCTION, ORDERING PLAINTIFF TO
PAY ONE-HALF OF THE COST OF
COMPUTER EXPERT AND GRANTING
SANCTIONS

BACKGROUND

The "International Defendants" seek the Court's intervention regarding two discovery disputes with Plaintiff Stephanie Green and Third-Party Defendant Local 12-369 (hereafter "Local") that they were unable to informally resolve prior to the close of discovery on July 15, 2009.

The Court has established a dispositive motion deadline of August 5, 2009 for summary judgment motions to be filed. The International Defendants aver that it is necessary for them to receive the requested documents prior to that date. Plaintiffs have not responded to the instant motion filed on July 16, 2009. (Ct. Rec. 171)

REPORT AND
RECOMMENDATION 1

1 REPORT

2 The first issue involves the International Defendants' motion to
3 compel under FRCP 37(a)(3)(B).

4 In June 2009, the International Defendants served three sets of
5 document requests: Second Set of Document Requests to Third-Party
6 Defendant Local 12-369, which was served on June 1 and for which
7 responses and responsive documents were due July 6; Third Set of
8 Document Requests to Plaintiff Green, which was also served on June 1,
9 with responses due on July 6; and Fourth Set of Document Requests to
10 Plaintiff Green, which was served on June 9 and for which responses were
11 due on July 13. To date, the International Defendants have received no
12 written response or documents in response to any of these requests. The
13 International Defendants seek an order compelling production of all
14 documents responsive to these requests by August 3, 2009.

15 The International Defendants allege that counsel for Plaintiffs -
16 primarily Janet Taylor - have repeatedly promised to produce the
17 requested documents and have failed to do so. Apparently since July 1,
18 2009, Ms. Taylor has indicated four times that the responsive documents
19 would be forthcoming. It appears that on July 15, 2009, counsel had an
20 informal agreement to and stipulation that the documents would be
21 produced by Friday, July 17 and a written stipulation was drafted.
22 Still, according to the International Defendants, Plaintiffs' counsel
23 later reneged on the oral stipulation and declined to sign the written
24 stipulation as drafted. This Court is aware that Ms. Taylor was on
25 vacation for about one week just prior to the discovery cut-off and that
26 other defendants have also complained about the Plaintiffs' failure to
27

1 produce documents responsive to discovery requests. See Ct. Rec. 141 and
2 170.

3 The second issue involves the cost of hiring an expert to search
4 the e-mail messages of the Local, which are apparently stored on a
5 single e-mail account. Allegedly, the parties had a general agreement
6 that the producing party would bear the cost of document production.
7 Apparently consistent with that agreement, the International Defendants
8 paid for the searches of the International's e-mail accounts in response
9 to the Plaintiffs' discovery requests. Plaintiffs now take the position
10 that it would be too burdensome for them to locate, print out and
11 produce the e-mails already identified by Plaintiffs as responsive to
12 the request for production.

13 Apparently, it is now the Plaintiffs' position that the
14 International Defendant should retain an expert, at its own expense, to
15 search the Local's e-mail data and that copies of that search should be
16 made available to the Plaintiffs. The International Defendants have
17 agreed to hire the expert, but ask the Court to order the Plaintiffs to
18 pay for half the cost, including copies of the material produced.

19 The third issue involves the International Defendants' request for
20 sanctions pursuant to FRCP 37(a)(5)(A)(ii) in the event the Court grants
21 the requested relief.

22 RECOMMENDATIONS

23 The Plaintiffs have not responded to the Motion to Compel. Even had
24 they done so, no motion for a protective order has been filed and the
25 documents requested appear to be reasonably related to the issues in
26 this matter and/or subject to discovery of relevant, admissible evidence

1 at the time of trial. For these reasons, **this Court recommends** that the
2 motion be granted.

3 As to the second issue, it does appear that the parties had an
4 agreement that the producing party would bear the expenses of
5 production. Since Plaintiffs have taken the position that production of
6 the e-mails from the Local's e-mail server would be too burdensome,
7 hiring an expert to conduct the search seems reasonable to this Court.
8 Further, the proposal to equally share the cost of such expert search
9 seems more than fair, given the agreement that the parties had. For
10 these reasons, **this Court recommends** that the Court order the
11 Plaintiffs to pay for one-half of the cost of the e-mail search,
12 including the cost of copies of document produced to the Plaintiffs.

13 As to the third issue, the rule makes it mandatory to award the
14 moving party's reasonable expenses, including attorney's fees, when the
15 motion is granted. Here, the Plaintiff has not responded to the
16 motion for sanctions. **This Court recommends** that the Court order
17 Plaintiffs and/or counsel for Plaintiffs to pay the International
18 Defendants' reasonable expenses incurred in bringing this motion. The
19 District Court may wish to allow Plaintiffs a further opportunity to
20 explain why the non-production was justified before awarding sanctions.

21 OBJECTIONS

22 Any party may object to a magistrate judge's proposed findings,
23 recommendations or report within ten (10) days following service with a
24 copy thereof. Such party shall file written objections with the Clerk of
25 the Court and serve objections on all parties, specifically identifying
26 the portions to which objection is being made, and the basis therefor.

1 Any response to the objection shall be filed within ten (10) days after
2 receipt of the objection. Attention is directed to Fed. R. Civ. P.
3 6(d), which adds additional time after certain kinds of service.

4 A district judge will make a de novo determination of those
5 portions to which objection is made and may accept, reject, or modify
6 the magistrate judge's determination. The judge need not conduct a new
7 hearing or hear arguments and may consider the magistrate judge's record
8 and make an independent determination thereon. The judge may, but is
9 not required to, accept or consider additional evidence, or may recommit
10 the matter to the magistrate judge with instructions. *United States v.*
11 *Howell*, 231 F. 3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and
12 (C), Fed. R. Civ. P. 72; LMR 4, Local Rules for the Eastern District of
13 Washington.

14 A magistrate judge's recommendation cannot be appealed to a court
15 of appeals; only the district judge's order or judgment can be appealed.

17 The District Court Executive is directed to file this Report and
18 Recommendation and provide copies to counsel and the referring district
19 judge.

20 **DATED** this 31st of July, 2009.

22 s/James P. Hutton

23 JAMES P. HUTTON
24 United States Magistrate Judge
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